

November 27, 2006

Kent County - Civil Division (739-7641)

Mr. Lee Williams
Investigative Reporter
The News Journal
P.O. Box 15505
Wilmington, DE 19850

**RE: Freedom of Information Act Complaint
Against Wilmington Housing Authority**

Dear Mr. Williams:

On October 10, 2006, our Office received your letter alleging that the Wilmington Housing Authority ("the Authority") violated the public record requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA").

Over the course of 2006, you made several FOIA requests to the Authority for e-mails that may have been sent by its Executive Director, Frederick Purnell, Sr., to any employee of the Authority on specified days or during specified weeks. You attached to your complaint a document dated April 26, 2006 requesting e-mails sent by Mr. Purnell on twenty-four days in 2005 and on five

Mr. Lee Williams
November 27, 2006
Page 2

days in 2006.¹ You also attached to your complaint a letter dated September 19, 2006 requesting e-mails sent by Mr. Purnell during five weeks in 2005 and during two weeks in 2004.

By letter dated October 2, 2006, the Authority responded to your September 19, 2006 FOIA request referring to its "response to your previous and similar request dated August 28, 2006. Because of storage limitations, the WHA electronic e-mail system does not store electronic message transactions beyond a ninety-day period. Since the requested information is more than ninety days old and there would be no reason to archive such data, the requested information cannot be provided."

According to the Authority, there was a typographical error in its letter of October 2, 2006: your "previous and similar request" was dated August 17, 2006 (not August 28). Our Office does not have a copy of any August 17, 2006 FOIA request you may have made to the Authority, however, you did provide us with a copy of the Authority's August 28, 2006 response to that request.

By letter dated August 28, 2006, the Authority denied your request for Mr. Purnell's e-mails for two weeks in 2004 and eight weeks in 2005 on the ground that it "is overbroad and lacking in specificity." The Authority also maintained that "[b]ecause of storage limitations, the WHA electronic-mail system does not store transactions beyond a ninety-day period. Since the requested information is more than ninety days old, and there would be no reason to archive such data, the requested information cannot be provided."

By letter dated October 23, 2006, we asked the Authority to respond to your FOIA complaint

¹ The Authority contends that your April 26, 2006 FOIA request "was never sent to, nor received by, WHA."

by November 3, 2006. We received the Authority's response on November 3, 2006. According to the Authority, "the Complaint is without merit because the requests are overbroad and lacking in specificity. Further, a request for all emails for certain weeks is unreasonable." The Authority also contends that it "is unable to produce documents that are responsive to the request in any event." The Authority provided our Office with an affidavit from the Authority's Chief of Information Technology, Sarah A. Babain. That affidavit states: "WHA's computer system provides backup for emails for a ninety day period. On a daily basis a tape is used to back up emails in an employee's email mailbox. The tape is overridden every ninety days with the new daily backup. Accordingly, any unarchived and otherwise unsaved email would be overridden after ninety days and would no longer be retrievable."

On November 16, 2006, we asked the Authority for additional information about the possibility that any of Mr. Purnell's e-mails might be saved on his personal computer or archived by the Authority's information technology personnel. According to the Authority's counsel: (1) Mr. Purnell did not save any e-mails on his personal computer which he may have sent to WHA employees on the dates specified in your FOIA requests; and (2) no one else at the Authority, including the Information Technology department, has saved or archived Mr. Purnell's e-mails for the dates you requested so they were overridden after ninety days and are no longer retrievable.

RELEVANT STATUTES

FOIA requires that "[a]ll public records shall be open to inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate

public body." 29 *Del. C.* §10003(a).

LEGAL ANALYSIS

"FOIA does not require a public body to produce public records that do not exist.'" *Att'y Gen. Op.* 05-IB19 (Aug. 1, 2005) (quoting *Att'y Gen. Op.* 96-IB28 (Aug. 8, 1996)). Counsel for the Authority has verified that there are no retrievable e-mails on the dates specified in your FOIA requests. "It has been our historical practice to accept such representations from an attorney for 'the custodian of public records to determine that such documents do not exist for purposes of FOIA.'" *Att'y Gen. Op.* 06-IB10 (May 4, 2006) (quoting *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 97-IB01 (Jan. 14, 1997))). "[T]he nonexistence of a record is a defense for the failure to produce or allow access to the record.'" *Att'y Gen. Op.* 05-IB19 (quoting *Att'y Gen. Op.* 96-IB28)).

We determine that the Authority did not violate the public records requirements of FOIA because any of Mr. Purnell's e-mails that might have been responsive to your request no longer exist. Therefore we do not need to address the Authority's argument that your FOIA requests were "burdensome" because they did not reasonably identify the records you were seeking.

While we do not reach this issue, we note that Delaware's FOIA "does not contain an exception to disclosure for requests deemed by a public agency to be burdensome. The issue of whether a request sufficiently describes the public records sought, so that they can be located with reasonable effort, is distinct from whether there might be an administrative burden involved. Every public records act contemplates there will be some burden in complying with a records request."

Mr. Lee Williams
November 27, 2006
Page 5

Att'y Gen. Op. 97-IB06 (Mar. 17, 1997). FOIA anticipates some burden will be associated with a public body's responding to a request for public records and for that reason authorizes the public body to charge a reasonable cost.

Mr. Lee Williams
November 27, 2006
Page 5

CONCLUSION

For the foregoing reasons, we determine that the Authority did not violate FOIA because the e-mails you requested do not exist.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin, Esquire
Chief Deputy Attorney General

Keith R. Brady, Esquire
Assistant State Solicitor

Barry M. Willoughby, Esquire

Phillip G. Johnson
Opinion Coordinator